

STATE OF TENNESSEE

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Opinion No. 04-009

Jurisdiction of trial courts to order diversion without certificate of prior convictions from TBI

QUESTIONS

1. May a court place a defendant on judicial diversion without having first received a Tennessee Bureau of Investigation Certificate pursuant to Tenn. Code Ann. § 40-35-313(a)(3)(A) and (B)?
2. If the court does grant diversion without such a certificate, what is the effective date of the diversion - the date the court acts or the date the certificate is received from the Tennessee Bureau of Investigation?

OPINIONS

1. Pursuant to Tenn. Code Ann. § 40-35-313(a)(3)(A), a court is not authorized to enter an order of diversion without first receiving a certificate from the Tennessee Bureau of Investigation (“TBI”) stating that the defendant does not have a prior felony or Class A misdemeanor conviction.
2. The date the order is entered with the TBI certificate attached in compliance with Tenn. Code Ann. § 40-35-313(a)(3)(A) is the effective date of the diversion.

ANALYSIS

1. Tennessee Code Annotated section 40-35-313 provides that, following a determination of guilt by plea or by trial, a trial court may, in its discretion, defer further proceedings and place a qualified defendant on probation without entering a judgment of guilt. Tenn. Code Ann. § 40-35-313(a)(1)(A) (Supp.2002). A qualified defendant is one who pleads guilty or is found guilty of a misdemeanor or Class C, D, or E felony; has not been previously convicted of a felony or a Class A misdemeanor; and is not seeking deferral for a sexual offense or a Class A or B felony. *Id.* § 40-35-313(a)(1)(B). If the defendant successfully completes the period of probation, the trial court is required to dismiss the proceedings against him, and the defendant may have the records of the proceedings expunged. *Id.* § 40-35-313(a)(2), (b).

The statute also provides that “no order deferring further proceedings and placing the defendant on probation as authorized by this subsection (a) may be entered by the court. . . unless there is attached to it a certificate from the Tennessee bureau of investigation stating that the defendant does not have a prior felony or Class A misdemeanor conviction.” § 40-35-313(a)(3)(A). Thus, from the plain language of the statute, a judge may not *enter* an order of diversion without the TBI certificate attached. Of course, there is nothing to prohibit the court from granting diversion contingent on the receipt of the TBI certificate, as long as the order is not *entered* on the record without the certificate. *See, e.g., State v. Andrew Phillip Stover*, No. E2002-02821-CCA-R3-CD, 2003 WL 22569105 (Tenn. Crim. App., Nov. 10, 2003).

2. The effective date of an order granting judicial diversion is the date on which it is entered by the clerk of court into the record. *See, e.g., Graham v. State*, 90 S.W.3d 687, 690 (Tenn. 2002) (Ten-day filing period in Tenn. Code Ann. § 40-30-217(c) begins when order denying motion to reopen is filed with the trial court clerk and not when the judge signs the order or the clerk enters it into the minutes).

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